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No. 78-1592

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOEL A. SHARON and ANN L. SHARON, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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The questions presented in this federal income tax case are whether petitioner:[1] (1) was entitled to deduct as a business expense a portion of the rent he paid for the apartment in which he resided because he used a spare bedroom to perform employment-related tasks on some evenings and weekends; (2) whether he was entitled to amortize the cost of his undergraduate and legal educations and two bar review courses over his professional lifetime; and (3) whether he was entitled to an award of costs incurred in the Tax Court.

[1] "Petitioner" refers to Joel A. Sharon. Ann L. Sharon is a party solely because she filed a joint return with her husband for the years at issue.

a. The pertinent facts are undisputed and may be summarized as follows: During 1969 and 1970, while petitioner was employed as an attorney by the Internal Revenue Service, he and his family resided in a three-bedroom apartment in suburban San Francisco. Petitioner set aside one of these three bedrooms for use as a study. Petitioner used this room to perform work that he brought home from his office. He also used the room as a place to read professional books and journals, to care for his personal correspondence, and to perform work in connection with his investments. While the spare bedroom was generally reserved for petitioner's use, he would occasionally permit guests to circulate there when he entertained a large group of people. Petitioner kept no records with respect to the portion of time he used the room in connection with employment-related tasks (Pet. App. 22).

The Internal Revenue Service did not require petitioner to maintain a workspace in his home. Instead, petitioner was provided with keys to his downtown office at the Internal Revenue Service so he could work there and use the library and other work facilities located there after normal hours. Petitioner, however, found it more convenient to work at home. If he stayed late at the office, he had to eat at a restaurant and his trip home became more difficult, because of the relative unavailability of public transportation after normal commuting hours (Pet. App. 23).

On his income tax returns for 1969 and 1970, petitioner deducted one-sixth of the total rent he paid during those years on the ground that the cost of maintaining the study in his home was a business

expense (Pet. App. 4). The Tax Court concluded that under the circumstances of this case, petitioner's expenses were personal in nature and therefore nondeductible under Section 262 of the Internal Revenue Code of 1954 (26 U.S.C.) (Pet. App. 8). The court of appeals affirmed (Pet. App. 22).

b. Petitioner attended Brandeis University for four years and received a bachelor of arts degree in June, 1961. He then studied law at Columbia University School of Law and received a bachelor of laws degree in June, 1964. Petitioner paid a total of $18,035 in connection with his undergrad ate and legal education. Petitioner thereafter became a member of the New York and California bars. In preparation for the bar examinations given in these two states, petitioner spent a total of $405.20 for bar review courses (Pet. App. 4-5). On his income tax returns for the years at issue, petitioner claimed that he was entitled to amortize these amounts over the period from his admission to the bar until he reached the age of 65, when he anticipated that he would retire. The Tax Court upheld the Commissioner's disallowance of these deductions (Pet. App. 9-10) on the ground that these expenses were personal expenditures which "constitute an inseparable aggregate of personal and capital expenditures." See Treasury Regulations on Income Tax, Section 1.162-5(b) (26 C.F.R.) (Pet. App. 9-10). The court of appeals affirmed (Pet. App. 23-24).

c. Petitioner paid $20 as a fee for filing two petitions in the Tax Court (Pet. App. 7) which he sought to recover as an award of costs. The Tax Court denied the request on the ground that 28 U.S.C. 2412 did not authorize it to award costs (Pet. App. 15-16). After noting that petitioner had conceded at oral argument that he had not been a "prevailing party" in the Tax

Court, the court of appeals affirmed the denial of costs (Pet. App. 24-25).

1. Section 161 of the Internal Revenue Code of 1954 provides that, for purposes of computing "taxable income," "there shall be allowed as deductions the items specified in this part, subject to the exceptions provided in part IX (Sec. 261 and following, relating to items not deductible)." As this Court observed in *Commissioner* v. *Idaho Power Co.*, 418 U.S. 1, 17 (1974), this provision is a "priority ordering" directive foreclosing the deduction of any expense specifically made nondeductible by Sections 261 through 279 of the Code, even if it might otherwise have come within the terms of a provision authorizing a deduction. Section 262, one of these deduction-barring provisions, provides that "no deduction shall be allowed for personal, living, or family expenses." Thus, under the specific directive of Section 161, any expense which might be arguably deductible as a business expense under Section 162(a), would be nevertheless nondeductible if it also constitutes a "personal, living, or family" expense under Section 262.

The facts of this case demonstrate that petitioner's use of a room in his apartment as an office arose out of personal considerations. As the court of appeals correctly concluded (Pet. App. 23), petitioner adopted this arrangement to make working in the evening more pleasant and convenient. The fact that petitioner's employer provided him with an office that was always available and that was unquestionably suitable for the peformance of his overtime work further illustrates that petitioner's use of an office in his home was prompted by personal considerations. As the Fourth Circuit has held in a case involving identical circumstances of

another Internal Revenue Service employee (*Bodzin* v. *Commissioner*, 509 F. 2d 679, 681, cert. denied, 423 U.S. 825 (1975)), "the expense of renting the * * * apartment was a personal expense within the meaning of § 262."

Contrary to petitioner's contention (Pet. 7), the decision below does not conflict with *Newi* v. *Commissioner*, 432 F. 2d 998 (2d Cir. 1970). There, the taxpayer was an outside salesman of television time for the American Broadcasting Company, who used a study in his apartment in the evening to view television advertisements, to review his day's sales activities, to study research materials and ratings and to plan the following day's activities. In allowing a deduction for the expenses allocable to the taxpayer's home study, the court emphasized the facts that viewing television programming was essential to the performance of the taxpayer's duties as a salesman and that the study was not only the most suitable, but, as a practical matter, the only place in which he could perform this aspect of his business (432 F. 2d at 1000). Thus, contrary to petitioner's assertions (Pet. 7-8), there is no indication that the Second Circuit would have upheld a deduction in the circumstances of this case, where petitioner's use of his home for after-hours work was prompted solely by personal considerations.[2]

2. This Court's holding in *Idaho Power Co.* likewise forecloses petitioner's claim (Pet. 8-10) that his college

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[2]As the court of appeals pointed out (Pet. App. 23 n.1), the issue has no continuing significance. For taxable years beginning after December 31, 1975, Section 280A(c)(1) (26 U.S.C.) bars any deduction for business use of residences unless the taxpayer uses some portion of the residence exclusively and on a regular basis as his principal place of business or to meet clients.

and law school expenses and the expenses he incurred in taking bar review courses should be amortizable over his professional life. As the court of appeals correctly noted (Pet. App. 23-24), petitioner's educational expenses represent an indivisible amalgam of personal and professional costs. As in the case of the costs of clothing or commuting which are related and even necessary to an individual's occupation, Section 262 prohibits the deduction of such expenses.[3] See *Fausner* v. *Commissioner*, 413 U.S. 838, 839 (1973); *Carroll* v. *Commissioner*, 418 F. 2d 91, 95 (7th Cir. 1969); Treasury Regulations, Sections 1.262-1(b)(9) and 1.162-5 (26 C.F.R.); cf. *Welch* v. *Helvering*, 290 U.S. 111, 115-116 (1933).

3. Finally, the courts below correctly concluded that petitioner was not entitled to recover the $20 in costs he incurred in the Tax Court. Petitioner correctly conceded that he was not a "prevailing party" eligible to claim costs under 28 U.S.C. 2412. Moreover, the Tax Court is not authorized by that statute to award costs against the government. Congress intentionally excluded the Tax Court from the operation of Title 28. S. Rep. No. 1559, 80th Cong., 2d Sess. 2 (1948). As the Tax Court properly pointed out (Pet. App. 15-16), the authorization in Section 2412 applies only to costs taxed by "[a] judge or clerk of *any court of the United States*." 28 U.S.C. 1920 (emphasis supplied). The Tax Court is not such a "court." 28 U.S.C. 451.

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[3]The expenses here are qualitatively different from those concededly business-oriented expenditures involved in the cases upon which petitioner relies (Pet. 9). See, *e.g.*, *Radio Station WBIR, Inc.* v. *Commissioner*, 31 T.C. 803 (1959); *KWTX Broadcasting Co.* v. *Commissioner*, 31 T.C. 952, aff'd, 272 F. 2d 406 (5th Cir. 1959); *Dustin* v. *Commissioner*, 53 T.C. 491 (1969), aff'd, 467 F. 2d 47 (9th Cir. 1972); *Tube Bar, Inc.* v. *Commissioner*, 15 T.C. 922 (1950).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
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